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Insurance - Automobile Liability Insurance - "Temporary Substitute" Provision - Withdrawn From Normal Use

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then added that to permit the possibility of tax avoidance through recognition of losses to control the construction of the limitation of gain provision would be to overrule the apparent judgment of Congress on this question.[31]

Although the adoption of the rationale of the instant case might well result in the conversion of what would otherwise be legitimate reorganizations into transactions in which losses would be currently recognizable, it would seem that the legislative history soundly supports the instant decision. If Congress has constructed this provision in such a manner as to permit its abuse, the correction should be made by the Congress, not by judicial fiat.

Martin Smith, Jr.

INSURANCE — AUTOMOBILE LIABILITY INSURANCE — "TEMPORARY SUBSTITUTE" PROVISION — WITHDRAWN FROM NORMAL USE

Plaintiff sought to recover damages resulting from an accident in which defendant's insured was involved. Defendant had issued a liability policy on a family car which was registered and insured in the wife's name. At the time of the accident the husband was driving the son's car, because the poor condition of the tires on the family car rendered its use on long trips hazardous. Despite the condition of the tires on the family car, the wife and son continued to use it to go a short distance to and from work. The insurer contended that the family policy issued to the wife did not provide coverage for the accident since the family car had not been withdrawn from normal use as required by the temporary substitute provision. The court of appeal held for the plaintiff, finding that the family car had been withdrawn from regular, normal use and that the son's automobile was a temporary substitute automobile covered by the policy issued on the family car. On appeal to the Louisiana Supreme Court, *held,* reversed, two Justices dissenting. The son's car was not a temporary substitute automobile because the insured's automobile had not been withdrawn from normal use as required by that provision.[1] *Fullilove v. United States Casualty Co.*, 125 So.2d 389 (La. 1960).

31. *Id.* at 675.

1. It appears that the opinion did not consider the question of breakdown to any appreciable extent. Before considering the question of withdrawal from normal use the court stated: "[T]ires being necessary to the operation of the

The guiding principle of the family automobile policy "is to cover virtually every risk contingency which might reasonably occur in a family's use of automobiles."[2] In general, the policy attempts to provide protection for the insured against liability growing out of the use of an automobile without regard to the particular automobile being used at the time when liability attaches. At the same time certain limitations are imposed for the purpose of enabling the insurer to set premiums which will not make the cost of such a policy prohibitive.[3] Broadening of coverage, while maintaining reasonable premiums, has been accomplished through such provisions as the "non-owned automobile," "owned automobile," and "temporary substitution" provisions.[4]

A non-owned automobile as defined by most policies means an automobile not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile.[5] The non-owned provision provides coverage not only for the named insured but also for a *relative* who resides in the household of the insured who has the insured's permission to use the car. Apparently the restriction applicable to the automobile owned by a relative residing in the household was inserted in the non-owned automobile definition to prevent relatives who reside together from buying only one policy and obtaining coverage for both cars.[6] Absent such an exclusion, the named insured could purchase one policy covering the family car and then use only the car owned by a relative while the relative used only the named insured's automobile. The named insured's

automobile, 'breakdown' occurs when the condition of the tires are such that the automobile is immobilized or unfit for normal use." Fullilove v. United States Casualty Co., 125 So.2d 389, 392 (La. 1960).

2. Derrickson, *The Family Automobile Policy*, 18 CASUALTY & SURETY J. 45 (1957).

3. Lloyds America v. Ferguson, 116 F.2d 920 (5th Cir. 1941); Central Nat. Ins. Co. v. Sisneros, 173 F. Supp. 757 (D. N.M. 1959); Allstate Insurance Co. v. Roberts, 156 Cal. App.2d 755, 320 P.2d 90 (1958); 5A AM. JUR., *Automobile Insurance* § 87 (1956).

4. See Derrickson, *The Family Automobile Policy*, 18 CASUALTY & SURETY J. 45 (1957); Parcher, *The New Family Automobile Policy*, 24 INS. COUNSEL J. 13 (1957).

5. A relative is defined as a relative of the named insured who is a resident of the same household. Persons insured with respect to a non-owned automobile include: (1) the named insured, and (2) any relative, but only with respect to a private passenger automobile or trailer, provided the actual use thereof is with the permission of the owner.

6. *Ibid.* See American Fidelity & Casualty Co. v. Pennsylvania Casualty Co., 258 S.W.2d 5 (Ky. App. 1953); Utilities Ins. Co. v. Wilson, 207 Okla. 574, 251 P.2d 175 (1952).

policy would then cover both members of the household for a premium rate applicable to a single vehicle.[7]

Although the insured is generally not protected when he is driving the car of a relative living in the same household, he is protected if the relative's automobile is a temporary substitute vehicle as defined in the policy.[8] A temporary substitute vehicle is one that has been substituted for the insured's vehicle when it has been withdrawn from normal use because of breakdown, repair, servicing, loss, or destruction.[9]

Under the temporary substitute provision, the *temporary* requirement has been held to be satisfied by a finding that the use of another automobile was not intended to be permanent.[10] Some courts have held that in order for this provision to be applicable the automobile borrowed by the insured must be in fact *substituted* for the insured vehicle.[11] Under these cases,

7. Absent this provision the named insured would be protected under the non-owned provision and the relative would also receive the benefit of the named insured's policy as a permittee of the named insured driving the named insured's automobile. See Saint Paul-Mercury Indemnity Co. v. Heflin, 137 F. Supp. 520 (W.D. Ark. 1956); Utilities Ins. Co. v. Wilson, 207 Okla. 574, 251 P.2d 175 (1952); Annot., 34 A.L.R.2d 936, 950 (1954).

8. A temporary substitute automobile is defined in most policies as any automobile or trailer, not owned by the named insured, while temporarily used as a substitute for the owned automobile or trailer when withdrawn from normal use because of its breakdown, repair, servicing, loss, or destruction. The named insured includes the person named in the policy and his spouse, if a resident of the same household.

Originally the family policy defined an owned automobile as a private passenger, farm, or utility automobile or trailer owned by the named insured, and included a temporary substitute automobile. Under this definition, any automobile acquired by the named insured during the term of the policy was apparently covered, even though no notice was given to the insurer. The only requirement was that the named insured inform the company of the new acquisition during the policy period. Derrickson, *The Family Automobile Policy*, 18 CASUALTY & SURETY J. 45 (1957). This provision has been changed in virtually all policies to require notification of acquisition of a second car within 30 days and to limit coverage to automobiles described in the policy.

9. A temporary substitute automobile is included within the definition of an owned automobile; this has the effect of extending coverage not only to the named insured but to any person who has the permission of the named insured to drive the car. See Davidson v. Fireman's Fund Indemnity Co., 165 N.Y.S.2d 598, 4 App. Div.2d 759 (1957), *motion to vacate denied*, 172 N.Y.S.2d 776, 5 App. Div.2d 878 (1957), *aff'd*, 181 N.Y.S.2d 510, 5 N.Y.2d 838, 155 N.E.2d 405 (1958), where the person using the insured vehicle with permission of the named insured borrowed another automobile when the insured's vehicle became inoperable. The court held that the temporary substitute provision did not extend to an automobile borrowed without consent of the named insured. *Accord*, Grundeen v. United States Fidelity & Guaranty Co., 238 F.2d 750 (8th Cir. 1956).

10. Fleckenstein v. Citizens' Mut. Automobile Ins. Co., 326 Mich. 591, 40 N.W.2d 733 (1950) (use of a borrowed car for five months by an insured while his car was being repaired was found to be temporary). See 5A AM. JUR., *Automobile Insurance* § 87 (1956).

11. In Western Casualty & Surety Co. v. Norman, 197 F.2d 67, 69 (5th Cir. 1952), the court stated that the insured must prove not only that the "vehicle

it must be shown that the insured vehicle would normally have been used for the specific undertaking but for some condition which necessitated the use of another vehicle.[12] Other courts have stated that a borrowed automobile will not be considered a temporary substitute if it is found that the substitution was merely a convenience,[13] or was made because the borrowed vehicle was more suited to the specific undertaking than the insured vehicle.[14] One case has required that the insured be given possession and control over the substitute automobile similar to that he would have had over the disabled car.[15]

Much controversy has arisen over the interpretation of the requirement that the automobile be *withdrawn from normal use.* Possibly the earliest expression by a court in interpreting this phrase is found in *Erickson v. Genisot*[16] where the provision was held to require withdrawal from *all* normal use.[17] Most subsequent cases have adopted this interpretation.[18] Practically, it appears that the determinative factor has been whether or not an insured continued to make some use of the disabled vehicle. Where such use is found, recovery has been denied.[19] However,

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had been withdrawn from service because of breakdown, but also that except for this the insured car would have been in use at the time and in the circumstances involved. Such showing is necessary to establish 'temporary use as a substitute', *i.e.* a car put in place of another." *Accord*, State Farm Mut. Automobile Ins. Co. v. Bass, 192 Tenn. 558, 241 S.W.2d 568 (1951).

12. *E.g.*, Western Casualty & Surety Co. v. Norman, 197 F.2d 67 (5th Cir. 1952).

13. See Iowa Mutual Ins. Co. v. Addy, 132 Colo. 202, 286 P.2d 622 (1955); Ransom v. Fidelity & Casualty Co., 250 N.C. 60, 108 S.E.2d 22 (1959); State Farm Mut. Automobile Ins. Co. v. Bass, 192 Tenn. 558, 241 S.W.2d 568 (1951). It would seem, however, that the above cases actually presented a problem of withdrawal because of breakdown, servicing, repair, loss or destruction as required by the terms of the policy and should have been disposed of on this ground rather than a finding that the substituted vehicle was more convenient.

14. State Farm Mut. Automobile Ins. Co. v. Bass, 192 Tenn. 558, 241 S.W.2d 568 (1951).

15. Tanner v. Pennsylvania Threshermen & F.M.C. Ins. Co., 226 F.2d 498 (6th Cir. 1955).

16. 322 Mich. 303, 33 N.W.2d 803 (1948).

17. *Id.* at 304, 33 N.W.2d at 804: "[W]ithdrawal of the truck from *normal use*, necessitated its withdrawal from *all normal use.*"

18. Service Mutual Ins. Co. v. Chambers, 289 S.W.2d 949 (Tex. Civ. App. 1956). See Ransom v. Fidelity and Casualty Co., 250 N.C. 60, 108 S.E.2d 22 (1959); State Farm Mut. Automobile Ins. Co. v. Bass, 192 Tenn. 558, 241 S.W.2d 568 (1951). *Contra*, Mid-Continent Casualty Co. v. West, 351 P.2d 398, 400 (Okla. App. 1959): "Under the reasonable and liberal interpretation that must be given the 'temporary substitute automobile' provision, its wording does not mean that the insured's own car, or the 'described automobile' must be disabled from all use."

19. Erickson v. Genisot, 322 Mich. 303, 33 N.W.2d 803 (1948); Service Mutual Ins. Co. v. Chambers, 289 S.W.2d 949 (Tex. Civ. App. 1956).

Recovery was also denied where the insured continued to use a borrowed car for a period of ten days after the insured's automobile had been repaired and returned to normal use. The court stated that the insured car must be withdrawn

excluding cases in which the substitution was purely a matter of convenience, where the disabled vehicle was not driven during the use of the borrowed vehicle, recovery has been allowed.[20] In the only reported case involving the substitution of an automobile due to the bad tires of the insured vehicle, it was held that the normal use of the insured vehicle encompassed out-of-town use and that bad tires disabled the car for normal use.[21] Although in that case the disabled car was not in use at the time, the insurer contended that the insured vehicle *could* have been used and that therefore the substitute automobile should not be counted as a temporary substitute automobile within the terms of the policy. The court rejected this contention, saying that such a distinction would overlook the important difference between normal use by the insured and "possible use by someone other than the insured,"[22] thus avoiding the problem of partial withdrawal.

The instant case is the first Louisiana decision considering the interpretation of the "temporary substitution" provision.[23] Although the court's decision is in accord with the interpretation afforded the temporary substitution provision in similar cases in other jurisdictions in which the disabled car was driven during the use of the borrowed car, it appears to be a departure from the general rule that insurance provisions are to be liberally construed in favor of the insured.[24] Since the term used in the policy is "normal use" rather than simply "use," there must be a distinction between withdrawal from *normal use* and withdrawal from *use*. A withdrawal from use would seem to require withdrawal from any use, whereas a withdrawal from normal use would necessarily presuppose some use of the vehicle

at the time of the accident. Pennsylvania Threshermen & F.M.C. Ins. Co. v. Robertson, 259 F.2d 389 (4th Cir. 1958).

20. Central National Ins. Co. v. Sisneros, 173 F. Supp. 757 (D.N.M. 1959); Allstate Ins. Co. v. Roberts, 156 Cal. App.2d 755, 320 P.2d 90 (1958); Fleckenstein v. Citizens' Mut. Automobile Ins. Co., 326 Mich. 591, 40 N.W.2d 733 (1950); Mid-Continent Casualty Co. v. West, 351 P.2d 398 (Okla App. 1959); Lewis v. Bradley, 7 Wis.2d 586, 97 N.W.2d 408 (1959).

21. Mid-Continent Casualty Co. v. West, 351 P.2d 398 (Okla. App. 1959). The court did not decide or make mention of whether bad tires constituted a breakdown, repair, servicing, loss, or destruction as required by the policy.

22. *Id.* at 401.

23. In the instant case the son and the named insured were residents of the same household. Therefore, a consideration of the temporary substitute provision was necessitated because coverage was not available under the non-owned provision since the policy definition of a non-owned automobile excludes an automobile owned by a relative residing in the same household.

24. This criticism was made by Justice Sanders in dissent. Fullilove v. United States Casualty Co., 125 So.2d 389, 397 (La. 1960). See authorities cited therein.

short of the way in which it was normally used. In other words a *partial* withdrawal of the automobile from the use to which it was normally put would seem to be a withdrawal from *normal use*. Therefore it would seem that this term must refer to a *partial* rather than a *total* withdrawal from use. As stated previously, in general, the policy purports to provide protection for the insured against liability growing out of the use of an automobile without regard to the particular automobile being used. To this certain exceptions are provided in order to prevent the cost of premiums from becoming prohibitive or any attempt by the insured to provide coverage with respect to more than one automobile while paying a premium rate applicable to a single car. Recognizing, however, that insureds may, on occasion, need to use such a relative's car when the insured's own vehicle is not functioning properly, the family policy provides coverage for the insured in such situations under the temporary substitute provision. If this appraisal of the intent of the policy is correct, it would seem that the proper solution to the problem of partial withdrawal would depend in each case upon a determination of whether or not the use of the substitute is temporary in nature and is traceable to the breakdown, repair, servicing, loss, or destruction of the automobile described in the policy. If so, then he *ought* to be covered by his policy which basically purports to "cover virtually every risk contingency which might reasonably occur" and the circumstances of each case are a sufficient guard against any attempt to avoid the payment of two premiums.

If the proposition that coverage should not be denied simply because of the limited use of the insured's automobile is accepted, the only remaining question would be whether or not the condition of the automobile described in the policy which resulted in the partial withdrawal was due to breakdown, repair, servicing, loss, or destruction.[25] Thus it would seem that if recovery is to be denied in cases involving substitution due to bad tires, it should be done on the ground that bad tires do not constitute a *breakdown* and not on the theory that the words "normal use" require withdrawal from "all normal use."[26] Fur-

25. In neither reported case involving bad tires did the court squarely face the issue of breakdown. In Mid-Continent Casualty Co. v. West, 351 P.2d 398 (Okla. App. 1959), recovery was allowed without mention of this requirement and in the instant case the court seems to assume that this constituted a breakdown.

26. The insurer's objection to multiple coverage resulting if protection is afforded when the insured's disabled automobile is not totally withdrawn from use would not seem to merit serious consideration in light of the fact that in other

ther it would seem that in most cases it would be to the insurer's benefit to allow the insured to use a substitute automobile when his own car becomes dangerous to drive as long as it is clear that the named insured, by using the other car, is not trying to avoid the payment of two premiums.

Gerald L. Walter, Jr.

LABOR LAW — SECONDARY PRODUCTS PICKETING UNDER THE LABOR MANAGEMENT RELATIONS ACT

In furtherance of its dispute with a manufacturing company, the respondent union picketed retail stores selling the company's products. The signs, which appealed to the consuming public not to buy the disputed products, were carried by one picket at consumer entrances of each retail establishment. Picketing began after employees of the retail stores reported for work and ceased before they normally left for the day. Although some employees used the consumer entrances during the day and could see the picketing from inside the stores and although many deliveries were made through these entrances, no retail employees refused to work or handle products and no deliveries were interfered with. Acting upon charges filed by the retailers, the National Labor Relations Board *held* that this picketing constituted an unfair labor practice in violation of Section 8(b) (4) (B) (i) and (ii) of the Labor Management Relations Act as amended in 1959 because it induced and encouraged secondary employees to strike or refuse to perform services and restrained and coerced owners of the retail stores to cease doing business with another person. *Wholesale and Warehouse Employees, Local 261 (Perfection Mattress & Spring Co.)*, 129 N.L.R.B. No. 125 (Dec. 31, 1960).

A secondary boycott in labor law can generally be defined as the bringing of economic pressure against a person not involved in a labor dispute for the purpose of increasing pressure on a party involved in the dispute.[1] A type of secondary boycott is

situations the policy clearly contemplates such a result. For example, where a family policy is issued to Mr. or Mrs. *A*, and Mr. *A* gives his son permission to use the family car while Mr. *A* uses a car borrowed from *X*, and Mrs. *A* uses a car borrowed from *Y*, the policy covers the use of all three automobiles. Mr. and Mrs. *A* are both named insureds and are therefore protected under the non-owned provision and the son is protected under the owned automobile provision.

1. See Alpert v. Local 1066, International Longshoremen's Association, 166 F. Supp. 22 (D.C. Mass. 1958). See also 105 CONG. REC. 3926-28 (1959) (remarks of Rep. Lafore).